U.S. Department of Justice

United States Attorney
Eastern District of New York

RB/EMN
F. #2007R00730

271 Cadman Plaza East
Brooklyn, New York 11201

January 19, 2009

By ECF and Facsimile

The Honorable Jack B. Weinstein
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Charles Carneglia
Criminal Docket No. 08 CR 76 (S-13) (JBW)

Dear Judge Weinstein:

The government writes to respond to the defendant's motion, filed at 8:30 p.m. this evening, seeking to preclude eight categories of audio and video materials produced to the defendant based on the allegation that these materials were produced after January 12, 2009. Because the allegations are factually incorrect, the materials should not be precluded.

Following the Court's order that all audio and video material be produced by January 12, 2008, the government produced three video clips, totaling less than six minutes in length combined, as well as a compact disc containing the defendant's prison calls from November 1, 2008 through January 5, 2009. Each of these items was hand delivered to defense counsel Curtis Farber on January 12, 2009. See Government's January 12, 2009 Discovery letter, attached at Exhibit A (noting the hand delivery of such materials and the length of the videos). The government is thus unaware of any reason to preclude these materials, since it fully complied with the Court's order.[1] Indeed, the government is at a loss as to the distinction the defendant is drawing between these materials and "the two minute video tape properly delivered on January 12th" since these materials were all delivered together in one package.

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[1] These materials are identified in the defendant's letter as (1) a home video of a christening from 1960, (2) two personal videos, (3) a CD-ROM containing "128 (approximately 70 of which were previously disclosed) jail calls made by the defendant."

Since January 12th, the government has produced no audio or video materials whatsoever as Rule 16 discovery. In accord with its obligations under 18 U.S.C. § 3500, however, the government provided the defendant with two items clearly designated as 3500 material. First, it provided a copy of a compact disc containing a one-minute long voice-mail message a cooperating witness left for one of the Assistant U.S. Attorneys on Monday, January 12th. That recording was provided to defense counsel the next day. In addition, the government produced as 3500 material one consensual recording made by a cooperating witness. The government in no way indicated that it would seek to admit that recording at trial, but produced it immediately upon discovery of its existence to fulfill its obligations under 18 U.S.C. § 3500. Because both items were not produced as Rule 16 discovery, but as 3500 material, defendant need not move for their preclusion – the government has already indicated that it will not introduce them.

On January 7, 2009, well in advance of the January 12th deadline for audio and visual discovery, the government made available to the defendant the remainder of the discovery items he seeks to preclude. Specifically, as has been the practice throughout the 11 months this case has been pending, the government provided the materials to a vendor from whom the defendant could have obtained them within 24 hours. To confirm this fact, last Thursday, the government spoke with the owner of its vendor, Joseph Meisner. Mr. Meisner stated that defense counsel did not contact him to obtain a copy of the materials identified in the January 7th discovery letter until late on Friday, January 9th. Moreover, at that point, defense counsel not only ordered two copies of the materials - thereby doubling the length of time it would take to receive the copies – but also failed to relate any urgency or ask that the materials be produced quickly. Mr. Meisner confirmed that if defense counsel had ordered one copy of the materials and requested expedited delivery, he would have completed the order in one business day.[2]

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[2] Indeed, Mr. Meisner then demonstrated precisely how quickly he could perform. The government had called Mr. Meisner because it was concerned about defense counsels' report to the Court that the defendant had been unable to acquire the materials identified in the January 7th letter. During the call, Mr. Meisner not only informed the government of the above, but stated that he had *still* not received any request from the defense for expedited discovery, nor any complaint that the materials had not yet been produced. When the government asked that Mr. Meisner immediately complete the order on an expedited basis, it was produced to Mr. Farber within hours.

Thus, if defense counsel had requested the materials in a timely fashion for expedited delivery, the defendant would have received all the materials at issue by January 9th. Because defense counsel's own actions prevented the defendant from obtaining copies of the materials at issue by the Court's deadline, the defendant should be estopped from now seeking their preclusion. Indeed, it should be noted that the defendant's initial request for the materials at issue *followed* the Court's imposition of the discovery deadline for audio and visual materials, creating the appearance that the materials were ordered in a manner to ensure the deadline was not met, rather than the opposite.

Finally, it should also be noted that following the production of all materials to Mr. Farber on Thursday, the government called him to confirm that the defendant had no further outstanding discovery concerns. The government then followed up on this conversation with a confirmatory email, which is attached at Exhibit B. In light of these exchanges, the government must note that the defendant's motion – filed 13 hours prior to the final pretrial conference – once again gives the impression that the defendant is not here seeking redress of the issues of which he now complains, but unfair tactical advantage.

For these reasons, no Rule 16 materials identified by the defendant should be precluded. Further, were the Court to consider preclusion based on the defendant's inaccurate recitation of the facts, the government would request an evidentiary hearing at which it could call Mr. Meisner and others to establish an accurate factual record.

Respectfully submitted,

BENTON J. CAMPBELL
United States Attorney

By: /s/
Roger Burlingame
Evan Norris
Marisa Megur Seifan
Assistant U.S. Attorneys
(718) 254-7000

cc: Clerk of Court (JBW) (via ECF)
Curtis Farber, Esq. (via ECF)
Kelly Sharkey, Esq. (via ECF)

Exhibit A

U.S. Department of Justice

United States Attorney
Eastern District of New York

RAB:sw
F. #2007R00730
Discovery 42

271 Cadman Plaza East
Brooklyn, New York 11201

January 12, 2009

By Hand and ECF

Curtis J. Farber, Esq.
350 Broadway, 10th Floor
New York, New York 10013

Kelley Sharkey, Esq.
26 Court Street, Suite 1016
Brooklyn, New York 11242

Re: United States v. Charles Carneglia
Criminal Docket No. 08 CR 76 (S-13) (JBW)

Dear Counsel:

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the government furnishes the following additional discovery in the above-referenced case. The government requests reciprocal discovery from the defendant.

The items described below are located at First Choice. You may obtain the documents by contacting Joe Meisner at (718) 381-1480 x212 and referencing print order number 86351. Additionally, as a courtesy, the government will have these items hand delivered by Deluxe Delivery Systems to Mr. Farber's office by the close of business today.

Exhibit #	Description
904	DVD - Video clips dated 5/16/93 (59 seconds)
905	DVD - Video clips dated 10/11/96 (2 minutes, 28 seconds)
906	DVD - Home video clips (1 minute, 54 seconds)
907	CD - Prison telephone calls dated 10/31/08 - 1/5/09
908	BOP Trueview and Trufone records dated 10/31/08 - 1/4/09
909	Photographs of American Airlines building and the Crossbay Diner (formerly Blue Fountain Diner)

Please contact me if you have any questions or requests.

Very truly yours,

BENTON J. CAMPBELL
UNITED STATES ATTORNEY

By: /s/
Samantha Ward
Paralegal Specialist
(718) 254-6142

cc: Clerk of the Court (JBW)

Exhibit B

Burlingame, Roger (USANYE)

From: Burlingame, Roger (USANYE)
Sent: Thursday, January 15, 2009 4:51 PM
To: curtis farber
Subject: Transcripts

Curtis.

Please find attached the transcripts you requested. To confirm, this completes the production of all outstanding discovery to date. Should you discover that you are missing anything else, please let me know immediately.

Thank you.

Roger

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63057_001.pdf...